Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

CLIFF AND BERTHA GARDNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Federal Government owns the unappropiated public land within the State of Nevada.

II. Whether the Federal Government can assert legislative jurisdiction within the boundaries of the State of Nevada based solely on Article IV, Section 3, Clause 2 of the United States Constitution.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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Petitioners, Cliff and Bertha Gardner, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 25, 1997 in order to resolve the Federal Government's claim of ownership of 87% of the land within the State of Nevada, and the Federal Government's claim of jurisdiction based on Article IV, Section 3, Clause 2, of the United States Constitution.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals that gives rise to this petition is reported at 107 F.3d 1314 (9th Cir. 1997), and is reproduced in the Appendix ("App") filed herewith at A. The opinion of the district court in this case is reported at 903 F. Supp. 1394 (1995) and is reproduced in the Appendix at B. The judgment in the civil case is reproduced in the Appendix at C.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 25, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Treaty of Guadalupe Hidalgo, 9 Stat. 922;

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places

> purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, magazines, Arsenals, dockyards, and other needful Buildings. . . .

United States Constitution, Article 1, Section 8, Clause 17;

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice and Claims ofthe United States, or of any particular State.

United States Constitution, Article IV, Section 3, Clause 2;

The Northwest Ordinance, of 1787, reprinted in, 1 Stat. 50 (Aug. 7, 1789);

13 Stat. 30 (Mar. 21, 1864);

18 U.S.C. § 17 (Special Maritime and Territorial Jurisdiction ofthe United States Defined);

> Subject to existing rights, all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control.

Nevada Revised Statutes § 321.5973.

STATEMENT OF THE CASE

The United States of America, claims to be the owner of 87% of the land area within the boundaries of the State of Nevada. This claim is based on the Treaty of Guadalupe Hidalgo, 9 Stat. 922. By reason of such claimed ownership, the United States of America claims legislative jurisdiction "without limitation" over such lands pursuant to Article IV Section 3, clause 2 of the United States Constitution.

The Gardners are the owners of the Dawley Creek Ranch which is nearly surrounded by such claimed lands. The Gardners and previous owners of the Dawley Creek Ranch have grazed their cattle on such claimed land continuously since 1872.

In August of 1992, a fire burned over a portion of the Gardners' grazing area. The Gardners' home and buildings narrowly escaped being consumed in this fire. The burned area was immediately reseeded and the Gardners were advised that they could not graze on the area for a period of two years. During April and early May of 1994, a continuing series of rain and snow storms created growing conditions that caused an abundant burst of plant growth in such claimed lands above the Gardners' ranchhouse. The Gardners knew from experience that if such forage was left unharvested it would create an even greater risk of serious fire. The Gardners requested that someone from the Forest Service investigate these conditions and that they be allowed to graze the areas adjacent to their home and outbuildings. No investigation was made, and permission to graze was denied.

Lightning storms are a certainty during the summer months in Northeast Nevada. If the forage remaining from 1993, combined with that generated by the unusually favorable weather conditions of 1994, was not removed it would result in a heavy

fuel load when dry summer months came. To allow this two year accumulation of fuel to surround the Gardner ranch placed the entire operation in imminent danger. Other remedies were impractical. The Gardners placed sufficient head of cattle on the claimed lands to reduce the fuel load to acceptable levels.

The Federal Government commenced the underlying action claiming that:

1. "As sovereign (it) owns the unappropirated land within Elko County, Nevada.

2. Federal law and regulation require a permit prior to placing livestock on such land.

3. Gardners allowed livestock to be on such land without a permit."

The Findings of Fact, Conclusions of Law and Order of the District Court identify the federal law and regulation upon which the judgment is based as follows:

> 1. The federal government retains and manages federal land within the State of Nevada pursuant to its powers under the Constitution, primarily the Property Clause which gives Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

United States Constitution, Article IV, Section 3, Clause 2.

None of the enumerated powers of Congress contained in Article I of the United States Constitution are invoked to support the regulations alleged to require the permit to graze livestock.

Matters of historical fact: Great Britain established sovereignty over the region of North America by discovery and contest, and title to all vacant land was vested in the crown. *Johnson v. Mc'Intosh,* 21 U.S. (8 Wheat.) 543 (1823). After the American Revolution, title to the public land "passed definitively to the States." *Id.* at 583. As a condition of ratifying the Articles of Confederation the six states without western lands insisted on an agreement that the landed states divest themselves of their western lands. The landed states agreed to surrender their lands (the Northwest Territory) to the Confederation for the purpose of forming new and independent states.

Congress adopted the Northwest Ordinance (1 Stat. 50) to establish territorial governments, to admit new states and to apply the proceeds of sale of the lands to the Revolutionary War debt. The Ordinance also provided that states were to be formed in the Territory and that those future states would be admitted "on an equal footing with the original states in all respects whatever." *Id.* Article V. The power of the Federal Government to hold title to property was created through the adoption of the Enclave Clause, which allows the Federal Government to hold land in "places purchased by the consent of the Legislature of the State" for "the erection of forts, magazines, arsenals, dockyards and other needful buildings." United States Constitution, Article I, Section 8, Clause 17. The thirteen original states continued to own all unappropriated public lands within their borders following ratification of the Contitution in 1789. *See* Paul Gates, *History of Public Land Law Development* (1968). By 1796, Vermont, Kentucky and Tennessee also had been admitted to the Union, each owning all the unappropriated land within their boundaries. *Id.* at 287. Opinions of this Court confirmed that new states took all unappropriated land upon statehood.

> That the original states acquired by the revolution the entire rights of soil, and of

> sovereignty, is most certain. And if it be true, that Alabama was admitted on an equal footing in regards to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable water; and so can nine other states equally hold, to the utter destruction of all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a common fund of the Union.

Mayor and Aldermen of the City of Mobile v. Eslava, 41 U.S. 234 (1842).

> We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed except for the temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana .... Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the union on an equal footing with the original

> states, the constitution, laws and compacts, to the contrary notwithstanding.

Pollard v. Hagen, 44 U.S. 212 (1845).

By its Act, 13 United States Statutes at large [1864], pp. 30-32, Congress authorized the formation of the Constitution and state government of the State of Nevada. Section two of that Act defined the boundaries of said State and provided that "that the said State of Nevada shall consist of all territory included within the following boundaries, to wit: . . ." The lands within the legal description, set forth thereinafter, were ceded to the State of Nevada by the act of statehood. There was no reservation of ownership, municipal sovereignty, or jurisdiction over such lands by the Federal Government. The people of Nevada have asserted their ownership of the public lands through their legislature.

REASONS FOR GRANTING THE WRIT

This is a case of first impression.

This specific issue (who owns the dry, public uplands) has not been litigated in this Court.

Courts (including this Court) have occasionally assumed federal ownerhip in cases involving the public lands where such ownership was asserted and not contested, but this Court has never decided the issue. *See* Rotunda & Nowak, 3.6, p. 322, n. 4.

The issues raised are of general importance.

The claimed ownership and assertion of jurisdiction pursuant to Article IV rankles the West. Resource based interests

across the so-called public lands states are becoming increasingly aware of the law presented in this case and the absence of constitutional authority for the federal claim of ownership. The eroding legitimacy of that claim is disquieting to a broad segment of people on both sides of the issue.

In prior years assertions of jurisdiction to enforce federal regulations on the unappropriated lands within the State of Nevada were based on 18 U.S.C. § 7 (Special Maritime and Territorial Jurisdiction of United States Defined). Since this Court's opinion in *Kleppe v. New Mexico,* 426 U.S. 529 (1976) that jurisdiction is claimed to rest on ownership of the public lands. No act of Congress conferring such jurisdiction on the federal courts is relied on. Jurisdiction is claimed under Article IV, Section 3, Clause 2.

The *Kleppe* opinion has been severely criticized in the scholarly writings. Professor David E. Engdahl, in his treatise *Constitutional Federalism In A Nutshell,* Second Edition, West Publishing Co. (1987) writes of the opinion as follows:

> In 1976, with an opinion that displays darkest ignorance of what had been established for two centuries before, the Supreme Court unanimously (albeit unawares) revolutionized its doctrine under that clause. (Article IV, Sec. 3, Cl. 2) Kleppe v. New Mexico, 426 U. S. 529 (1976) The briefing on behalf of New Mexico was inept, and for its part, the Court conspicuously failed to deal with many . of the relevant cases and demonstrably misunderstood others. (Pg. 228) . . . . Kleppe held that "Congress exercises the powers both of a proprietor and of a legislature over the public

> domain." .... On this view, Congress can make rules for federal property which have no relation whatever to any matter otherwise of legitimate federal concern, and any such rule, being legislative in character, "necessarily overrides conflicting state laws under the Supremacy Clause." (Pg. 229) ... as to property located within the boundaries of states, that is a profoundly novel proposition which makes a mockery of the basic purpose of enumerated powers doctrine.... What Kleppe really means is that over all the vast federal public domain within states, the United States has plenary, general governmental jurisdiction, and is not confined to those enumerated powers which it may exercise elsewhere in the country. It means that as to the east and the middle west, enumerated powers doctrine remains the foundation of constitutional power analysis, but as to the roughly half of the country from the Rocky Mountain states westward it as absolutely no significance at all. (Pg. 231) Kleppe's misallocation of governing authority over Article IV federal property is irreconcilable with the "equal footing" doctrine revitalized in Corvallis just seven months later. (Pg. 231) One who has learned from the study of two centuries of organic constitutional doctrine that sound principles most often ultimately return can assert confidently that Kleppe must eventually be overruled. (Page 232).

The Gardners submit that it means 87% of their state is

held in colonial or territorial status, and that they are surrounded by lands governed without limitation by a government whose seat of power is further away from them, in spirit, than the colonists were from England.

The resolution of this issue would contribute to the development of national law:

The decision of the Ninth Circuit further erodes the equal footing doctrine by purporting to establish a hierarchy of classifications of sovereignty of the States of the Union based on the ownership of the lands that comprise each state prior to statehood. The Ninth Circuit distinguished *Pollard v. Hagen, supra,* by holding that *Pollard* was based on the terms of the cessions of the land from which Alabama was formed from the states of Virginia and Georgia. (This is historically incorrect. The situs of Mobile, Alabama was within the Louisiana Purchase.) The Ninth Circuit held, "Because the State of Nevada had no independent claim to sovereignty and the United States owned the lands previously, Nevada cannot claim the same rights of sovereingty as Alabama."

In discussing the equal footing doctrine the Ninth Circuit holds that the equal footing doctrine only acts to establish equality with regard to political standing and sovereingty. This holding ignores the fact that the most fundamental element of sovereignty is paramont title or eminent domain. The court holds that the equal footing doctrine applies primarily to the shores of and lands beneath navigable water, not to fast dry lands. This limitation is absurd when compared to the full statement of that doctrine from the Northwest Ordinance (on an equal footing with the original states in all respect whatever) to the statement of that doctrine in *Coyle* v. *Smith,* 221 U.S. 559:

This Union was and is a Union of States,

> equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. The definition of 'a State' is found in the powers possessed by the original states which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union.

Coyle v. Smith, 221 U.S. 559, 566 (1911) (internal citation omitted).

Likewise, Nevada was admitted into the Union on an equal footing with the original states. 13 United States Statutes at Large (1864) pp. 749-750.

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states will be upon an equal footing, in all respects whatever . . . and as soon as these purposes could be accomplished, the power of the United States over these lands, *as property,* was to cease.

Pollard, 44 U.S. (3 How.) at 222.

Upon the creation of a new state, all the powers, sovereignty, and jurisdiction of governance that may exist, except for the enumerated powers delegated to the federal government, lodged in that state. Accordingly, those states as "states" held all the

rights of sovereignty and power held by the original thirteen states.

This Court concluded in 1845, that the land passed to the State of Alabama pursuant to the equal footing doctrine:

> Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it [the land comprising Alabama] to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states the constitution, laws, and compact, to the contrary notwithstanding.

Pollard, 44 U.S. (3 How.) at 228-9.

This Court further indicated that the United States held the land that became Alabama only as a trustee for the creation of the future state:

> [I]t was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them.

Id. at 222.

The Court decided then, that the United States had no power to convey such lands, but rather, was under a duty to hold them in trust for the future state. *Id.* at 230. Some years later, the Court was called upon to address the matter again, this time when the United States had made a conveyance of land prior to statehood. In *Shively v. Bowlby,* 15 U.S. 1, 14 S. Ct. 548 (1894), the Court determined that land held by the United States in territorial condition is held in trust for the future states. *Id.* at 566. The *Shively* Court concluded, however, that the United States does have the power to dispose of lands in the territories while they are in territorial condition to private parties "for the promotion of convenience in commerce with foreign nations and among the several States, or to carry our other public purposes appropriate to the objects for which the United States holds the Territory." *Id.* at 48. The *Shively* Court also reaffirmed the general principle of equal footing:

> Clearly, congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign, independent State, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the Federal compact.

Id. at 560.

The particular issue in dispute in *Pollard* and *Shively* concerned the ownership of land under navigable waters. But the doctrine of equal footing was recognized as much broader, encompassing all the powers, rights, privileges, incidents of sovereignty and conditions applicable to the original thirteen states. The doctrine was further extended in *Coyle v. Smith,* 221 U.S. 559 (1911), where the Court held:

> The plain deduction from this case is that *when a new State is admitted into the Union. it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States,* and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union *which would not be valid and effectual if the subject of congressional legislation after admission.*

Id. at 573 (emphasis added).

The characteristics of a "state" then, are:

Independence: This characteristic is defined as "The state or condition of being free from dependence, subjection, or control. A state of perfect irresponsibility. Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power." *Black's Law Dictionary,* Fourth Edition, page 911. No reasonable person would describe a state that is owned 87% by government with a different electorate as being independent. No reasonable person would describe such a state as being entirely autonomous, or as not being subject to the government, control, or dictation of any exterior power. Clearly the assertion of ownership by the federal government of 87% of the surface area of the State of Nevada violates the independence of the state. Can a state be 13% independent?

Sovereignty: The Ninth Circuit acknowledges that the equal footing doctrine requires that the State of Nevada enjoy full sovereignty. Nevertheless, it does not recognize what the term

"sovereignty" means. In his discussions of the rights of the King of England in Book II, Chapter Four, *Of Things.* Blackstone states:

> The grand and fundamental maxim of all feudal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holder, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord;* being he who retained the dominion or ultimate property of the feud or fee.

This doctrine of tenure was in affect during the colonial period. Lands in colonial America were granted by the English Crown pursuant to this doctrine. Upon the success of the revolution, it was this element of sovereignty that passed to the states. William R. Vance, *The Quest for Tenure in the United States,* 33 Yale Law Journal 248. Professor Vance traces these rights and duties in both England and the United States and concludes:

> In short the difference between lands "held by tenure in England and those "owned" allodially in the United States is little more than a difference in words. We shall express the same idea more exactly if we say that in England today the chief lord, usually the Crown as representing the State, does retain certain legal relations with respect to land occupied by tenants in fee, but, barring distress as of common right, none of these relations have any importance save the power of retaking the land by escheat upon failure of heirs and by eminent domain; and

these powers equally exist in the United States.

In the North Carolina Constitution and in the Georgia Constitution there are recitals to the effect that the **"property of soil** in a free government" is "one of the essential rights of the collective body of the people," and that by statute in Georgia all land in Georgia is allodial, that is, held of the state. The duties known as quit rents, take the form of taxes assessed on land and are merged in the larger sovereign power of general taxation. Accordingly, the paramount title and eminent domain of a state means the absolute ownership of all lands within its boundaries and is an intrinsic and fundamental attribute of sovereignty. No state can be said to be sovereign that does not have this basic and essential element of sovereignty. Accordingly, when the State of Nevada was admitted to the United States on an equal footing with the original states in all respects whatever, this meant with full sovereignty and included the paramount title and eminent domain of all lands within its boundaries.

In 1979 the legislature of the State of Nevada declared that, "Subject to existing rights, all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control." (Nevada Revised Statutes, § 321.5973).

Cliff and Bertha Gardner are citizens ofthe State of Nevada and under its jurisdiction. They are bound to recognize and obey its laws when those laws are within the constitutional authority of the state. They are also citizens of the United States and must recognize and obey its laws when those laws are within the constitutional authority of the federal government. Accordingly, they are subjected to two inconsistent claims of jurisdiction and must act according to that which their understanding convinces them to be the proper claim.

Freedom: "The state of being free; liberty; self-determination; absence of restraint; . . . ." *Ibid.* Page 792. The citizens of the State of Nevada, as a political community, do not enjoy the opportunity for self determination that citizens of non-public land states enjoy. If the claim of the Federal Government is vindicated, 87% of the most basic of all resources is denied to them. Their governmental control and action is restrained in 87% of their land surface.

Equal in Dignity: "In English law. An honor; a title, station, or distinction of honor. Dignities are a species of incorporeal hereditaments, in which a person may have a property or estate." *Ibid.* Page 543.

Equal in Authority: "Legal power; a right to command or to act; . . . ." *Ibid.* Page 169. Clearly the citizens of the State of Nevada do not enjoy equal authority over the lands within their state as do citizens of non-public lands states.

Having been admitted without condition, compromise, diminution, impairment, or otherwise unshorn of the attributes of statehood. The holding of the Ninth Circuit is that the State of Nevada was admitted with the condition that the federal government possessed the power to convert its disposal function with regard to the unappropriated lands into permanent title. Such a holding means that Nevada, unlike non-public land states, has been admitted in a diminished and impaired status.

Each and every one of these characteristics must be accorded to each and every state in order for that state to achieve its status under the Constitution and the doctrine of equal footing, subject only to the delegation to the Federal Government of the enumerated powers set forth in the Constitution.

Finally, the Ninth Circuit held that "Congress' power under the property Clause to administer its own property is virtually

unlimited. *Kleppe* 426 U.S. at 539". This expression is accurate when applied to territory outside the boundaries of a state, but its application to 87% of the area of an admitted state has the effect of holding that land to be in territorial status.

Article IV does not provide authority to hold lands, only jurisdiction to govern lands belonging to the United States. It was directed by the founders solely to dealing with the Northwest Terrritory, lands that had been ceded to the federal government by the states prior to the adoption of the Constitution. The property clause was confined and was intended to be confined to the area of the states a settled by the treaty with Great Britain and have no influence on territory afterwards acquired from a foreign government. *Scott v. Sandford,* 60 U.S. 393 (U.S. Mo. 1856); *Downes v. Bidwell,* 182 U.S. 244 (1901).

The United States acquired additional lands through treaty and conquest. Such lands were not held pursuant to provisions of the Constitution, but were held pursuant to the treaty and war powers and as powers obtained by the United States as an incident of the national sovereignty, not by any provision in the Constitution. *Cross v. Harrison* (1853). Article IV provides legislative jurisdiction over such lands while they are in territorial status. *United States v. Gratiot,* 39 U. S. 526 (1840). The language from the *Gratiot* case relied on by the Ninth Circuit when quoted completely is as follows:

> The term "territory" as here used, is merely descriptive of one kind of property, and is equivalent to the words "lands". And Congress has the same power over it as any other property belonging to the United States; and this power is vested in Congress without limitations, *and has been considered the foundation upon which the territorial governments rest.* (Emphasis supplied).

Such power is the full governance power. Pursuant to such power the Congress is authorized to establish an executive, a legislature, and courts. Indeed, a territorial act is itself a constitution. Such governance power clearly ceases immediately on statehood. *American Insurance v. 356 Bales of Cotton,* 26 U.S. 511 (1828); *Brenner v. Porter,* 50 U.S. 235 (1850).

> The Constitution deals with states, their people and their representatives. The sole object of the territorial clause was to transfer to the new government the Northwest Territory and to give power to apply that territory to the objects dictated by the states. The Constitution does not extend to territories of its own force. Congress has power over territory it does not possess in the States.

Downes v. Bidwell, page 773.

The clear implication of this holding is that the powers authorized to Congress pursuant to Article IV, Section 3, Clause 2, exist only outside the boundaries of states admitted into the union. It is a patent absurdity to assert that such full powers of governance cover 87% of the land surface of a state of the Union and at the same time assert that such state has been admitted to the Union on an equal footing with the original states in every respect whatever. The very argument that such power can exist within a state is itself sufficient refutation of the claim by the Federal Government that the public lands within the State of Nevada are property belonging to the United States.

The judicial power of territorial courts was long ago determined to cease upon admission of a state into the Union. In *Brenner v. Porter,* 50 U.S. 235 (1850) this Court stated:

> We think it clear, therefore, that on the unconditional admission of Florida into the Union as a State, . . . the Territorial government was displaced, abrogated, every part of it; and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the Federal Constitution and laws of Congress; . . . . The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. . . . The State authority was destructive of the Territiorial; and, in connection with the establishment of the Federal jurisdiction, the organization of the government, State and Federal, under the Constitution of the Union, became complete thoughout her limits. No place was left unoccupied for the Territorial organization.

The implication of the federal claim of ownership and the assertion of Article IV jurisdiction is clearly at odds with this holding. Moreover, this Court's historically consistent recognition of this holding as applied to the judicial power cannot be reconciled with the claim that upon statehood of the State of Nevada the Federal Government retained legislative jurisdiction "without limitation" over 87% of Nevada's territory.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of

> the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'

Coleman v. Thompson, 501 U.S. 1277, 1281, 111 S. Ct. 2546, 2570 (1991).

The Gardners are individuals who need the protection of politically responsive local officials who will protect their liberties. It is a fundamental violation of their rights to claim that they are citizens of the State of Nevada and the United States of America, yet are located in an area wherein agencies of the Federal Government can exercise despotic powers under the claim that the power delegated to them by Congress are "without limitation."

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Dated the 27th day of May, 1997.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 25, 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CLIFFORD GARDNER; BERTHA GARDNER, *Defendants-Appellants.*	No. 95-17042 D.C. No. CV-95-00328-DWH OPINION

Appeal from the United States District Court
for the District of Nevada
David W. Hagen, District Judge, Presiding

Submitted November 6, 1996*
San Francisco, California

Filed February 25, 1997

Before: Herbert Y. C. Choy, Thomas M. Reavley,** and Edward Leavy, Circuit Judges.

Opinion by Judge Choy

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*The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

**Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

Appendix A

SUMMARY

Real Estate/Public Lands

The court of appeals affirmed a district court judgment. The court held that the United States owns title to public lands in Nevada ceded to the United States by Mexico prior to Nevada's statehood and therefore the United States may regulate grazing on the land.

Appellants Clifford and Bertha Gardner owned a ranch in Nevada near the Humboldt National Forest. The Forest Service issued a permit allowing the Gardners' cattle to graze on certain allotments of the Humboldt National Forest. After a fire burned portions of the allotments, the Forest Service advised the Gardners that the burned areas would be closed to grazing for two years to allow the vegetation time to grow.

When the Gardners refused to remove their livestock or to pay unauthorized grazing fees, the United States filed a complaint seeking an injunction to prevent further unauthorized grazing and unauthorized grazing fees. The district court granted summary judgment in favor of the United States.

On appeal, the Gardners contended that the unappropriated lands in the state of Nevada, of which the Humboldt National Forest is a part, are not territory or other property belonging to the United States, and that therefore the Forest Service did not have jurisdiction to regulate use of the forest land or to levy fees for unauthorized activities within it. The Gardners argued that while the United States may have received the land from Mexico in the Treaty of Guadalupe Hidalgo in 1848, the United States was entitled only to hold the land in trust for the creation of future states, and was not authorized to retain the land for its own purposes. After Nevada became a state, they argued, all of the public lands within the state boundaries reverted to the state of Nevada.

Appendix A

[1] The Gardners' claim that it is the duty of the United States to hold public lands in trust for the formation of future states was founded on a case dealing with land acquired by the United States from the 13 original states. That case was not applicable to this case in which the federal government was the initial owner of the land from which the state of Nevada was later carved.

[2] The United States was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses, including the establishment of a national forest reserve.

[3] In interpreting the Equal Footing Doctrine, the Supreme Court has held that the shores of and land beneath navigable waters were reserved to the states, and were not granted by the Constitution to the federal government. The Court reasoned that new states have the same rights, sovereignty, and jurisdiction over the shores of and land beneath navigable waters as do the original states. [4] The Equal Footing Doctrine has not been extended and would not operate to reserve title to fast dry lands to individual states. [5] Moreover, the Supreme Court has held that the Equal Footing Doctrine refers to those attributes essential to a state's equality in dignity and power with other states. While a compact between a new state and the United States limiting political rights and obligations might be forbidden, a mere agreement in reference to property involves no question of equality of states. [6] The Equal Footing Doctrine would not operate to give Nevada title to the pubic lands within its boundaries.

[7] When Congress invited Nevada to join the Union in 1864, it mandated that Nevada pass an act promising that it would disclaim all right and title to unappropriated public lands within Nevada and that the lands would remain at the sole and entire disposition of the United States. [8] Since the United States already had title to those lands through the

Treaty of Guadalupe Hidalgo, the disclaimer clause was merely a recognition of the preexisting United States title, as opposed to a grant of title from Nevada to the United States. [9] The disclaimer clause was declaratory of the right already held by the United States under the Property Clause to administer its property, and as such was constitutional.

COUNSEL

Glade L. Hall, Reno, Nevada, for the defendants-appellants.

Albert M. Ferlo, Jr., United States Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the plaintiff-appellee.

William E. Schaeffer, District Attorney, Eureka, Nevada, for amicus Eureka County District Attorney.

T. David Haight, pro se, Yerington, Nevada, for amicus Chairman of the Lyon County Public Lands Planning Commission.

David Negri and Alletta Belin, Assistant Attorneys General, Santa Fe, New Mexico, for amicus State of New Mexico.

OPINION

CHOY, Circuit Judge:

Defendants-appellants Clifford and Bertha Gardner ("Gardners") appeal the summary judgment granted in favor of plaintiff-appellee United States. Gardners claim that the state of Nevada, not the United States, is the rightful owner of the public lands within Nevada. The district court granted the United States' request for an injunction against Gardners'

unauthorized grazing of livestock upon federal forest land, and also ordered Gardners to pay a fee for the unauthorized grazing. We affirm.

Factual and Procedural Background

Clifford and Bertha Gardner own the Dawley Creek Ranch in Nevada, near the Humboldt National Forest. The Humboldt National Forest is part of the National Forest System, which includes sections of "federally owned forest, range, and related lands" reserved or withdrawn from the public domain of the United States. 16 U.S.C. § 1609(a). The administration of the national forests is vested in the Secretary of Agriculture. 16 U.S.C. § 472. The Granger-Thye Act provides independent authority for the Secretary of Agriculture to issue permits for grazing on national forest land. 16 U.S.C. § 580l. Under the regulations of the Secretary of Agriculture, the grazing of livestock without Forest Service authorization on national forest lands is subject to the assessment of an "unauthorized grazing use" fee. 36 C.F.R. § 222.50(h).

In 1988, the Forest Service issued a ten-year grazing permit to Gardners, which allowed a portion of Gardners' cattle to graze on certain allotments of the Humboldt National Forest subject to the terms and conditions of the permit. A clause in the permit stated:

> It is fully understood and agreed that this permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comply with any of the terms and conditions specified in Parts 1, 2, and 3 hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder . . . .

Immediately above the signature line on the permit are the words: "I HAVE REVIEWED AND ACCEPT THE TERMS OF THIS PERMIT." Cliff Gardner signed the permit.

Appendix A

In August of 1992, a fire burned over 2,000 acres of the Mica C & H and Mica Creek Addition Allotments. The Forest Service and the Nevada Department of Wildlife reseeded the majority of the burned area in October and November of 1992. The Humboldt National Forest Land and Resource Management Plan specifies that reseeded areas must not be grazed by livestock for a two year period, to give the vegetation time to grow. Accordingly, in September 1992, the Forest Service advised Gardners that the burned area would be closed to grazing during 1993 and 1994. Gardners did not graze livestock in the affected area during 1993.

On May 13, 1994, Gardners sent a letter to the Forest Service stating that they intended to resume grazing on the burned area within 3 days. On May 18, 1994, the Forest Service observed Gardners' livestock grazing on the burned area. On May 19, 1994, the Forest Service hand-delivered a letter to Gardners advising that they were violating the terms and conditions of the permit by grazing cattle in the burned area, and requiring that the livestock be removed from the burned area by May 22, 1994. Gardners did not remove the livestock.

The Forest Service subsequently revoked Gardners' permit, and told Gardners that they would be billed for the unauthorized grazing at a rate of $6.12 per "head month." Additionally, the Forest Service informed Gardners that the cancellation decision could be contested through an administrative appeal. Gardners opted not to administratively appeal the decision.

Gardners continued to graze livestock on the burned area throughout the 1994 grazing season. Gardners also refused to pay the fee for the unauthorized grazing, assessed at $4,473.72, to the Forest Service.

On May 23, 1995, the United States filed a complaint seeking an injunction against Gardners to prevent further unauthorized grazing of Gardners' livestock in the Humboldt National

Forest. The United States also sought damages based on Gardners' unauthorized use of the national forest for grazing. On October 4, 1995, the district court granted the United States' motion for summary judgment. The district court enjoined Gardners from further unauthorized grazing and ordered them to remove their livestock from the forest area. The court also ordered Gardners to pay $7,030.41 to the United States as a fee for unauthorized grazing as of September 8, 1995.

Analysis

Gardners do not contest that they grazed livestock on forest land without a permit or other authorization from the Forest Service, nor do they contest the amount of the fee assessed. Instead, Gardners assert that the unappropriated lands in the state of Nevada, of which the Humboldt National Forest is a part, are not territory or other property belonging to the United States, and that therefore the Forest Service does not have jurisdiction to regulate use of the forest land or to levy fees for unauthorized activities within it.

This court reviews a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

I. The United States' Title to Federal Land in Nevada[1]

Gardners argue that grazing their livestock in the Humboldt National Forest without a permit does not constitute trespass because the federal government does not have title to the land

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[1]An Amicus Brief was filed on behalf of the states of New Mexico, Alaska, Maine, Montana, Oregon, Vermont, and, significantly, Nevada supporting the position of the United States in this case. Additionally, a federal district court in Nevada has held that title to the public lands within Nevada's boundaries rests in the United States. *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996).

on which the grazing took place. Gardners contend that, while the United States may have received the land in question from Mexico in the Treaty of Guadalupe Hidalgo in 1848, the United States was entitled only to hold the land in trust for the creation of future states, and was not authorized to retain the land for its own purposes. After Nevada became a state, Gardners argue, all of the public lands within the state boundaries reverted to the state of Nevada.[2]

The United States and Mexico signed the treaty of Guadalupe Hidalgo in 1848. In that treaty, Mexico ceded land that includes the present-day state of Nevada to the United States. 9 Stat. 922 (1848); *see also Sparrow v. Strong*, 70 U.S. (3 Wall.) 97, 104 (1865) ("The Territory, of which Nevada is a part, was acquired by Treaty."). The language of the Treaty itself refers to the land ceded by Mexico to the United States as "territories previously belonging to Mexico, and which remain for the future within the limits of the United States." 9 Stat. 922, 929 (1848). Courts in the United States have uniformly found that title to the land first passed to the United States through the Treaty. *See, e.g., United States v. California*, 436 U.S. 32, 34 n.3 (1978) (stating that, under the Treaty, "all nongranted lands previously held by the Government of Mexico passed into the federal public domain"); *Cappaert v. United States*, 426 U.S. 128, 131 (1976) (stating that a limestone cavern located in Nevada is "situated on land owned by the United States since the Treaty of Guadalupe Hidalgo in 1848").

[1] The claim by Gardners that it is the duty of the United States to hold public lands in trust for the formation of future

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[2]Gardners point out that Nevada recently passed a statute claiming ownership over all public lands within its boundaries, Nev. Rev. Stat. 321.5973. Gardners claim that the passage of this law further demonstrates that title to the public lands in Nevada properly rests in the state, not the federal, government. Gardners fail to note, however, that the Nevada statute by its own terms excludes national forest lands from the public lands claimed by Nevada. *See* Nev. Rev. Stat. § 321.5963.

states is founded on a case dealing with land acquired by the United States from the thirteen original states. In that case, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), the Supreme Court discussed the extent of the United States' authority over lands ceded to it from Virginia and Georgia to discharge debt incurred by those states during the Revolutionary War. The Court stated that the United States held this land in trust for the establishment of future states. *Id.* at 222. Once those new states were established, the United States' authority over the land would cease. *Id.* at 221-23. This decision was based on the terms of the cessions of the land from Virginia and Georgia to the United States. Before becoming a state, however, Nevada had no independent claim to sovereignty, unlike the original thirteen states. Therefore, the same reasoning is not applicable to this case, in which the federal government was the initial owner of the land from which the state of Nevada was later carved.

Thus, as the United States has held title to the unappropriated public lands in Nevada since Mexico ceded the land to the United States in 1848, the land is the property of the United States. The United States Constitution provides in the Property Clause that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Supreme Court has consistently recognized the expansiveness of this power, stating that "[t]he power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *United States v. San Francisco*, 310 U.S. 16, 29 (1940). *See also Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. California*, 332 U.S. 19, 27 (1947); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). Moreover, the Supreme Court has noted that Congress "may deal with [its] lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *Light v. United States*, 220 U.S. 523, 536 (1911) (internal

quotation marks and citation omitted). Indeed, the establishment of a forest reserve by Congress is a "right[ ] incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it." *Id.* at 537.

[2] The United States, then, was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses, including the establishment of a national forest reserve.

II. The Equal Footing Doctrine

Gardners argue that, under the Equal Footing Doctrine, a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union. Because the federal government owns over eighty percent of the land in the state of Nevada, Gardners argue, Nevada is not on an equal footing with the original thirteen states.[3] Gardners claim that Nevada must have "paramount title and eminent domain of *all* lands within its boundaries" to satisfy the Equal Footing Doctrine.

[3] The meaning of the Equal Footing Doctrine is discussed in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). In that case, the Supreme Court held that the shores of and land beneath navigable waters were reserved to the states, and were not granted by the Constitution to the federal government. *Id.* at 229. New states, the Court reasoned, have the

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[3]For example, in New Hampshire the federal government owns just under thirteen percent of the land. The federal government owns between two and seven percent of the land within the borders of nine of the other original thirteen states. In Connecticut, New York and Rhode Island, less than one percent of the land is owned by the federal government. Bureau of Land Management, U.S. Department of the Interior, Public Land Statistics 1993, at 5, Table 3 (September 1994).

same "rights, sovereignty, and jurisdiction" over the shores of and land beneath navigable waters as do the original states. *Id.*[4]

[4] However, the Supreme Court has declined to extend the Equal Footing Doctrine to lands other than those underneath navigable waters or waters affected by the ebb and flow of the tides. In *Scott v. Lattig*, 227 U.S. 229, 244 (1913), the Supreme Court held that title to an island within a stream did not pass to the state of Idaho, but instead was retained by the United States. The Court stated that because the island "was not part of the bed of the stream or land under the water . . . its ownership did not pass to the State or come within the disposing influence of its laws." *Id.* The Court went on to note that the island was "fast dry land, and therefore remained the property of the United States and subject to disposal under its laws . . . ." *Id.* Sixty years later, the Supreme Court characterized its decision in *Scott* as holding that the rule in *Pollard's Lessee* "does not reach islands or fast lands located within such waters. Title to islands remains in the United States, unless expressly granted along with the stream bed or otherwise." *Texas v. Louisiana*, 410 U.S. 702, 713 (1973). The Equal Footing Doctrine, then, does not operate to reserve title to fast dry lands to individual states.

[5] Moreover, Supreme Court has long held that the Equal Footing Doctrine refers to "those attributes essential to [a state's] equality in dignity and power with other States." *Coyle v. Oklahoma*, 221 U.S. 559, 568 (1911). The Court has noted that a new state enters the Union "in full equality with all the others," and that this equality may forbid a compact between a new state and the United States "limiting or qualifying political rights and obligations." *Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). However, "a mere agreement in reference to property involves no question of equality of

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[4]The Supreme Court later described the Equal Footing Doctrine as applicable to "all lands beneath waters subject to the tide's influence." *Phillips Petroleum Co. v Mississippi*, 484 U.S. 469, 484 (1988).

status." *Id.* The Court has observed that "[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil." *United States v. Texas*, 339 U.S. 707, 716 (1950). While these disparities may cause economic differences between the states, the purpose of the Equal Footing Doctrine is not to eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty. *Id.*

[6] The Equal Footing Doctrine, then, applies to political rights and sovereignty, not to economic or physical characteristics of the states. Moreover, the Equal Footing Doctrine applies primarily to the shores of and lands beneath navigable waters, not to fast dry lands. Therefore, the Equal Footing Doctrine would not operate, as Gardners argue, to give Nevada title to the public lands within its boundaries.

III. The Validity of Nevada's "Disclaimer Clause"

[7] When Congress invited Nevada to join the Union in 1864, it mandated that the Nevada constitutional convention pass an act promising that Nevada would "forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States . . . ." Nevada Statehood Act of March 21, 1864, 13 Stat. 30, 31 § 4. The state constitutional convention did so. Ordinance of the Nevada Constitution.[5]

Gardners claim that this clause is invalid and unconstitutional as an attempt to divest Nevada of its title to the unap-

[5]After the submission of this case, Gardners filed a document containing "Supplemental Authorities" pursuant to Fed. R. App. P. 28(j). In that document, Gardners discuss, *inter alia*, the rhetoric of the Disclaimer Clause. The disposition of this case is not altered by that discussion or by any of the other "Supplemental Authorities" presented by Gardners.

propriated lands within its boundaries. Gardners cite to *Van Brocklin v. Tennessee*, 117 U.S. 151, 167 (1886) for the premise that such disclaimer clauses "are but declaratory, and confer no new right or power upon the United States." Therefore, Gardners argue, Nevada could not have given the United States title to the public lands within its boundaries through the disclaimer clause.

[8] Gardners are correct in their argument that the disclaimer is declaratory. However, the United States did not need the disclaimer clause to gain title to the public lands in Nevada. The United States already had title to those lands through the Treaty of Guadalupe Hidalgo, and the disclaimer clause was merely a recognition of the preexisting United States title, as opposed to a grant of title from Nevada to the United States.

[9] As aforementioned, Congress' power under the Property Clause to administer its own property is virtually unlimited. *See, e.g., Kleppe*, 426 U.S. at 539. Indeed, the United States retains title to the public lands within states such as Nevada not due to "any agreement or compact with the proposed new State," but rather "solely because the power of Congress extend[s] to the subject." *Coyle*, 221 U.S. at 574. The disclaimer clause, then, is declaratory of the right already held by the United States under the Constitution to administer its property, and as such is valid under the United States Constitution. *Van Brocklin*, 117 U.S. at 167.

IV. The Tenth Amendment

Gardners argue that federal ownership of the public lands in Nevada is unconstitutional under the Tenth Amendment. Such ownership, they argue, invades "core state powers reserved to Nevada," such as the police power.[6]

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[6]The opinion of the district court contained no ruling on this issue.

Appendix A

Federal ownership of the public lands within a state does not completely divest the state from the ability to exercise its own sovereignty over that land. The state government and the federal government exercise concurrent jurisdiction over the land. In *Kleppe v. New Mexico*, the Supreme Court held that the Wild Free-roaming Horses and Burros Act was not an impermissible intrusion on the sovereignty of New Mexico. 426 U.S. 529 (1976). In so doing, the Court noted:

> Absent consent or cession a *State undoubtedly retains jurisdiction over federal lands within its territory*, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. [citations omitted] And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Id. at 543 (emphasis added). Indeed, a state may enforce its criminal and civil laws on federal land "so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580. The state of Nevada, then, is not being unconstitutionally deprived of the ability to govern the land within its borders. The state may exercise its civil and criminal jurisdiction over federal lands within its borders as long as it exercises its power in a manner that does not conflict with federal law.

V. Guarantee Clause, Equal Protection, and Political Accountability Claims

Gardners argue that the retention by the United States of the unappropriated public lands within the state of Nevada violates the Guarantee Clause of the United States Constitution. Gardners also contend that federal ownership of the public lands in Nevada denies them equal protection of the laws under the Fifth Amendment and fails the "political accountability test." As it does not appear that these issues were

raised before the district court, this court will not consider them. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

Conclusion

We AFFIRM the judgment of the district court.

APPENDIX B — FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA FILED OCTOBER 2, 1995

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-N-95-328-DWH

UNITED STATES OF AMERICA,

Plaintiff,

v.

CLIFF GARDNER AND BERTHA GARDNER,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Plaintiff has moved (# 7) for summary judgment. The matter has been fully briefed, argued and submitted for decision. The Court urged the parties to come to an accord and has delayed this decision in the hope they would. None having been reached, the matter will now be decided.

Standard on a Motion for Summary Judgment

Summary Judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law." F.R.Civ.P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins.* Co., 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir. 1982)

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id., 477 U.S. at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). Moreover, if the factual context makes the

nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987).

FINDINGS OF FACT

There is no genuine issue as to the following facts:

1. On February 2, 1848, the land that makes up the State of Nevada was ceded to the United States by Mexico in the Treaty of Guadalupe Hidalgo, 9 Stat. 922.

2. Article V of the Treaty defines the boundary line between the United States and Mexico which defines the territorial expanse of the two republics. *Id.* at 926-28. The Treaty, in relevant part, resulted in Mexico's cession of lands to the United States. These lands included the present day State of Nevada.

3. Since 1848, the United States has exercised its sovereign and proprietary rights over this property, including the imposition of certain tracts under the general land laws, the transfer of specific lands to the State of Nevada, and the reservation of other tracts for various purposes.

4. For example, in 1891, Congress authorized the President to "set apart and reserve" Forest Reserves from the public domain. 26 Stat. 1103. Beginning in 1906, the President used this authority to establish a number of forest reserves in Nevada. These reserves were soon consolidated into the Humboldt and Toiyabe National Forests.

5. On March 21, 1864, the United States Congress enacted the Nevada Statehood statute which authorized the residents of the Nevada Territory to elect representatives to a convention for the purpose of having Nevada join the Union. Nevada Statehood Act of March 21, 1864, 13 Stat. 30 (1864). Among its provisions, the Act granted certain tracts of United States' public lands to the State when it entered the Union. *See, Id.*, §§ 7-10 (1864).

6. In addition, the Nevada Statehood statute required the convention to adopt an ordinance agreeing and declaring that the inhabitants of the Territory of Nevada "forever disclaim all right and title to the unappropriated public lands lying within said territory. . . ." *Id.* at § 4.

7. Nevada's Constitutional convention accepted Congress's invitation to become a state and passed the Constitution of the State of Nevada, which includes an ordinance that states in relevant part:

> That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States.

Ordinance of the Nevada Constitution, reprinted in 1 Nev. Rev. Stat. at 20 (1986).

8. The Nevada Constitution provides that this "ordinance shall be irrevocable, without the consent of the United States and the people of the State of Nevada." *Id.*

9. Upon receipt of the State Constitution ratified by the inhabitants of the Nevada Territory and the Ordinance disclaiming all unappropriated public lands in the Territory, the President of the United States, on October 31, 1864, proclaimed that Nevada had been admitted to the Union. *See*, 13 Stat. 749.

10. The National Forest System is administered by the Forest Service under various statutes. The organic Administration Act of 1897, 30 Stat. 34, 16 U.S.C. § 473 *et seq.*, provides that lands may be reserved as National Forests. That statute further provides that the Secretary of Agriculture may issue rules and regulations concerning the National Forests.

11. In 1906, the Secretary of Agriculture issued regulations requiring that persons desiring to graze stock in the National Forests first secure a permit to do so from the Forest Service.

12. The Granter-Thye Act of 1950, 64 Stat. 82, 88, provides independent authority for the Forest Service to issue permits for grazing on National Forest lands. Section 19 of that statute, 16 U.S.C. § 5801, states:

> The Secretary of Agriculture in regulating grazing on the national forests . . . is authorized, upon such terms and conditions as he may deem proper, to issue permits for the grazing of livestock for periods not exceeding ten years and renewals thereof: *Provided*, That nothing herein shall be construed as limiting or restricting any right, title or interest of the United States in any land or resources.

Appendix B

13. In 1976, Congress enacted the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, which requires the preparation of land and resource management plans for each unit of the National Forest System which shall form one integrated plan for such units. 16 U.S.C. § 1604(a), (f)(1). Among other things, NFMA requires that "permits. . . for the use and occupation of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. § 1604(i).

14. In addition, Section 402(a) of the Federal Land Policy and Management Act of 1976 ("FLPMA"), 90 Stat. 2743, 43 U.S.C. § 1752(a), provides that, subject to certain exceptions, livestock grazing permits issued for National Forests in the sixteen contiguous Western States shall be for a term of ten years. Section 402(a) further provides that such grazing permits shall be:

> subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.

15. The Department of Agriculture's regulations concerning grazing on National Forest System lands are published at 36 C.F.R. Part 222.

Appendix B

16. The regulations caution that grazing permits "convey no right, title or interest held by the United States in any lands, or resources." 36 C.F.R. § 222.3(b). The regulations also state that the terms and conditions of a grazing permit can be modified "to conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs." 36 C.F.R. § 111.4(a)(7).

17. In addition, the regulations provide, among other things, that the Forest Service may cancel or suspend, in whole or in part, any grazing permits "if the permittee does not comply with provisions and requirements in the grazing permit or the regulations of the Secretary of Agriculture on which the permit is based." 36 C.F.R. § 222.4(a)(4).

18. Grazing without Forest Service authorization on National Forest lands is subject to assessment of an "unauthorized grazing use" fee. 36 C.F.R. § 222.50(h).

19. Forest Service policy specifies that the rate for unauthorized use is based on the full commercial value of leased forage, unadjusted for differential operating costs for grazing National Forest System lands and leased private rangelands. Forest Service Manual at 2238.4. The unauthorized use rate also does not take into account contributions made by the permittee to construct or maintain improvements. *Id.*

20. In 1994 the unauthorized use rate for grazing cattle in the sixteen contiguous western states was $6.12 per "head month." Forest Service Manual at § 2238 (Interim Directive effective from Mar. 1, 1994 - Mar. 1, 1995).

Appendix B

21. In 1988, the Forest Service issued a ten year grazing permit to the Gardners authorizing them to graze a certain number of cattle on specific allotments of the Humboldt National Forest, subject to the terms and conditions of the permit.

22. The Gardners were authorized to graze 294 cattle on the Mica C & H Allotment from May 1 to October 31, 53 cow/calf pairs on the Mica Creek Addition Allotment from May 1 to May 31, and 21 head of cattle on the Bureau C & H Allotment from April 16 to December 31.

23. Clause 3 of the permit stated in part that "[i]t is fully understood and agreed that *this permit may be suspended or cancelled, in whole or in part, after written notice, for failure to comely with any of the terms and conditions* specified in Parts 1, 2 and 3, hereof, or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder. . . ." (emphasis added). The permit was signed by defendant Cliff Gardner. The permit states, immediately above Mr. Gardner's signature, that **"I HAVE REVIEWED AND ACCEPT THE TERMS OF THIS PERMIT."** (Emphasis in original).

24. On or about August 30, 1992, the Dawley Creek Fire consumed over 2,000 acres of land in the Mica C & H and Mica Creek Addition Allotments.

25. In October and November of 1992, the Forest Service and the Nevada Department of Wildlife reseeded 1,554 acres of the burned area at an approximate cost of $40,000. The purpose of the reseeding was to revegetate the burned area which would eventually enable the resumption of grazing, would minimize

the risk of soil erosion, and would create a buffer to prevent the spread of wildfires in the future onto private lands.

26. The Humboldt National Forest Land and Resource Management Plan ("LRMP") requires that a reseeded area be rested from livestock grazing for a period of two years in order to allow the vegetation to grow and develop. As noted above, NFMA requires that grazing permits be consistent with the land management plans. 16 U.S.C. § 1604(i). In accordance with the Humboldt LRMP, the Forest Service instructed the Gardners in September 1992 that the area burned by the Dawley Creek Fire would be closed to grazing in 1993 and 1994.

27. The Forest Service did offer the Gardners the use of a temporary electric fence which could be used to cordon off the burned area from the remainder of the permitted allotments. The Gardners declined this offer.

28. The Gardners complied with the Forest Service's instructions and did not graze their livestock on the area burned by the Dawley Creek Fire in 1993. Such was not the case in 1994, however.

29. On or about May 13, 1994, the Gardners informed the Forest Service in writing that they intended to resume grazing on the burned area three days later (on or about May 17, 1994) notwithstanding the Forest Service's direction to the contrary.

30. On or about May 18, 1994, the Forest Service observed that Gardners' cattle were grazing on the burned area.

31. On or about May 19, 1994, the Forest Service hand delivered a letter to the Gardners which notified them that

grazing their livestock on the burned area was in violation of the terms and conditions of the permit, instructed them to remove their livestock from the burned area by May 23, 1994, and asked them to show cause why their grazing permit should not be cancelled by May 29, 1994.

32. On approximately June 9, 1994, following numerous attempts to obtain compliance with the terms of the then existing permit, pursuant to Forest Service regulations, the Forest Service cancelled the Gardners' permit, informed the Gardners that they would be billed for unauthorized grazing use at a rate of $6.12 per "head month" for the time the livestock remained on the Humboldt National Forest, and informed the Gardners that the cancellation decision was subject to administrative appeal.

33. Thereafter, on or about July 25, 1994, the Gardners informed the Forest Service that they would not appeal the cancellation decision.

34. Throughout the remainder of the 1994 grazing season, the Gardners continued to disregard the Forest Service's instruction that they remove their livestock from the Humboldt National Forest. The Gardners also failed to pay a bill of $4,473.72 to the Forest Service which represented the fee for unauthorized grazing use for 1994.

35. More recently, on or about May 3, 1995, the Gardners again placed their livestock on the Mica C & H Allotment without a permit.

36. On May 5, 1995, and then again on May 10, 12, 17, and June 1, 1995, the Forest Service requested that the Gardners remove their livestock from this allotment.

37. On June 1, 1995, the Forest Service also observed that the Gardners had placed two unauthorized structures on Forest Service property, apparently to aid their unauthorized grazing activity.

38. As of September 21, 1995, the Gardners have not removed their livestock notwithstanding the fact that they have no authorization to use this National Forest without written authorization. Further, the Gardners admit that they have no title to the land in question.

CONCLUSIONS OF LAW

1. Rule 56(c) off the F.R.Civ.P. sets forth the standard for the granting of summary judgment. In pertinent part, Rule 56(c) provides that summary judgment may be granted if there are no genuine issues as to any material fact and that, as a matter of law, the moving party is entitled to summary judgement. F. R. Civ. P. 56(c). *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

2. The Treaty of Guadalupe Hidalgo, in relevant part, resulted in Mexico's cession of lands to the United States. *See, e.q., U.S. v. California*, 436 U.S. 32, 34 n.3 (1978) (Supreme Court states that title to islands and mainland of California can be traced to Treaty of Guadalupe Hidalgo "by which Mexico ceded to the U.S. the islands lying off the coast of California"); *Cappaert v. U.S.*, 426 U.S. 128, 129 (1976); *U.S. v. Ringrose*, 788 F.2d 1102, 1105 (9th Cir. 1986); *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (l0th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977); *Sanchez v. Taylor*, 377 F.2d 733, 735

(10th Cir. 1967); *State of Nevada ex rel Shamberger v. U.S.*, 165 F. Supp. 600, 601 (D. Nev. 1958).

3. These lands included the present day State of Nevada. *See, e.g., Sparrow v. Strong,* 70 U.S. 49, 50 (3 Wall.) (1865) ("The Territory, of which Nevada is a part, was acquired by treaty").

4. The United States retains and manages federal lands within the State of Nevada, including Humboldt National Forest, pursuant to its powers under the Constitution, primarily the Property Clause, which gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2.

5. The Supreme Court has consistently interpreted this power to be extremely expansive, repeatedly observing that "the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976); *United States v. San Francisco,* 310 U.S. 16, 29 (1940). *See also, Alabama v. Texas,* 347 U.S. 272, 273 (1954); *United States v. California,* 332 U.S. 19, 27 (19487); *Gibson v. Choteau,* 80 U.S. (13 Wall.) 92, 99 (1871); and *United States v. Gratiot,* 39 U.S. (14 Pet.) 426, 537 (1840).

6. The Court has emphasized that Congress properly exercises the powers of both a proprietor and of a legislature over the public domain." *Kleppe,* 426 U.S. at 540; *Alabama,* 347 U.S. at 273.

7. The Gardners have no valid argument that the United State does not own the land at issue.

8. There is no merit to the Garners' contention that title to the public lands automatically transferred to the State of Nevada at the time it was admitted into the Union under the Equal Footing Doctrine. The doctrine does not require equality in land ownership or economic resources, but instead simply requires that all states be given equal political rights and sovereignty. *United States v. Texas,* 339 U.S. 707, 716 (1950), *reh'g denied,* 340 U.S. 907 (1950).

9. The doctrine exists to ensure that "each state shares 'those attributes essential to its equality in dignity and power with other states.' " *Nevada v. Watkins,* 917 F.2d 1545, 1554 (9th Cir. 1990), *cert. denied.* 449 U.S. 906 (1991). (quoting *Coyle v. Oklahoma,* 221 U.S. 559 (1911)).

10. In discussing the Equal Footing Doctrine, the Supreme Court has recognized that each state, upon entering the Union, came with different amounts of land owned by the federal government. *Texas,* 339 U.S. at 716. The Court has rejected the notion that this or other physical and economic differences were somehow precluded by the Equal Footing Doctrine: "The requirement of equal footing was designed not to wipe out these diversities but to create parity as respects political standing and sovereignty." *Id.*

11. The Equal Footing Doctrine has a direct effect on property rights in only one limited way, and that is to transfer title to States upon their entry to the Union of tidelands and submerged lands underlying inland navigable waterways. *U.S. v. California,* 332 U.S. 19, 29-39 (1947).

12. This aspect of the doctrine has its roots in English common law which provided that the King had title in the soil

of the sea below high water mark. *(Shivery v. Bowlby,* 152 U.S. 1, 57 (1894)). Because the Original 13 States were deemed to have the same right to these tidelands as the King; the Supreme Court held that new states should also have title to these submerged lands.

13. During the 1800s, the Supreme Court extended this Doctrine to include submerged land under navigable inland waterways not subject to the ebb and flow of the tide. [*See, e.g., Barney v. Keokuk,* 94 U.S. 324, 338 (1877); *Illinois Central Railroad v. Illinois,* 146 U.S. 387, 435-37 (1892).] The Court based this extension on its observation that the original rule was founded on the need for public use of navigable waterways. Due to its particular factual settings, England happened to equate "tide waters" with "navigable waters." [*Illinois Central Railroad,* 146 U.S. at 436.] In contrast, in the United States, there were tens of thousands of miles of navigable waterways not subject to the tide. Accordingly, the Court extended the Doctrine so that states were given title to land underlying all navigable waterways, whether or not subject to the tide. *See, Id.,* at 436-37.

14. To the limited extent the Equal Footing Doctrine applies to proprietary rights, it derived from the English common law which gave the King title to lads that were subject to the ebb and flow of the tide. Upon the American revolution, the original states were deemed to have the same rights as the King in this regard, and thus had title to these tidal lands, which were to be held in trust for the public. *Id.* The Supreme Court held that all states to lands given the same sovereign rights as the original 13 states to lands which were subject to the ebb and flow of the tide. *Id.* at 57-58.

15. The Equal Footing Doctrine does not, however, extend to upland territory. *Phillips Petroleum,* 484 U.S. at 473-76. The *Phillips* decision made clear that the submerged lands subject to the Doctrine included both (a) submerged lands underlying navigable inland waterways and (b) coastal lands subject to the ebb and flow of the tide (whether or not underlying navigable water). *See, Id.*

16. In short, any argument that the Doctrine extends beyond submerged lands has no basis whatsoever. In fact, the Supreme Court has even refused to extend the Doctrine to all submerged lands. *United States v. California,* 322 U.S. 19 (1947). With this decision, the Court limited the *Pollard* Doctrine to a subset of submerged lands. *See also, Arizona v. California,* 373 U.S. 546 (1963).

17. Thus, there is absolutely no merit to the Gardners' contention that title to the public lands passed to the State of Nevada at the time of statehood.

18. Similarly without merit is the Gardners' assertion that the United States has no authority to retain the public lands in its possession.

19. This proposition was long ago rejected by the Supreme Court. In *Light v. United States,* 220 U.S. 523 (1911), a rancher grazed his cattle on a National Forest without authorization. In his unsuccessful defense against the trespass action brought by the United States, the rancher argued that "Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located." *Id.* at 535-36.

20. The Supreme Court rejected this argument unequivocally. Beginning its discussion, the Court observed that its previous decisions had already established that the government "may deal with [its] lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *Is.* at 536 (quoting from *Camfield v. United States,* 167 U.S. 518, 524 (1897)).

21. Continuing its analysis, the Court set out the broad powers Congress has under the Property Clause of the Constitution, and held that Congress has the authority to retain or reserve the public lands, and pass laws to regulate those lands:

> All public lands of the nation are held in trust for the people of the whole country. [citation omitted]. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These rights are incident to proprietorship, to say nothing of the United States as a sovereign over the property belonging to it."

Id. at 537.

Appendix B

22. As *Light* reveals, the Gardners' theory was asserted and thoroughly rejected, over 80 years ago. *See also, Clackamas County, Oregon v. McKay,* 226 F.2d 343 (D.C. Cir. 1955), *cert. denied,* 3350 U.S. 904 (1955) (rejecting County's claim that the United States holds land "in trust or in receivership" for the State and thus could not retain land). These types of claims were also rejected by the Ninth Circuit much more recently. *United States v. Vogler,* 859 F.2d 638 (9th Cir. 1988), *cert. denied,* 488 U.S. 1006 (1989) (The Ninth Circuit rejected miner's contentions that the United States had no authority to regulate public lands because the Property Clause was intended by the framers as a temporary provision and that the enclave clause within the Constitution only allows one of the enumerated powers granted to Congress in U.S. Const. Art. I, § 8, cl. 17.) *See also, State of Nevada v. United States,* 512 F. Supp. 166 (D. Nev. 1981), *aff'd on other grounds,* 699 F.2d 486 (9th Cir. 1983).

23. The Gardners' contention that they have "acquired a vested grazing right through the common law, Common of Pasturage Doctrine" is without merit.

24. It is well-settled that historical grazing practices on public land was a privilege and conferred no legal right on the user. *Buford v. Houtz,* 133 U.S. 320 (1890); *Grimaud v. United States,* 220 U.S. 506 (1911); *Light v. United States,* 220 U.S. 523 (1911); *Omaechevarria v. State of Idaho,* 246 U.S. 343 (1918). *See also, Shannon v. United States,* 160 F. 870 (9th Cir. 1908); *Bell v. Apache Maid Cattle Co.,* 94 F.2d 847 (9th Cir. 1938); *Cliff Gardner & Bertha Gardner v. D. Waive Stager, et al.,* __ F. Supp. __, 1995 WL 433596 (D. Nev., June 30, 1995) (CV-N-94-846-ECR).

25. Given the unambiguous Supreme Court precedent, there can be no reasonable doubt that the National Forests, reserved from the public domain, are the property of the United States and rightfully managed by the Forest Service pursuant to federal law.

26. The United States thus has title and the right to administer the Humboldt National Forest.

27. Trespass is defined as an entry upon real estate of another without the permission or invitation of the person lawfully entitled to possession. Restatement 2d of Torts, §§ 158-159.

28. It is well-settled that one who, without right, enters public lands of the United States is a trespasser, *Jones v. United States,* 195 F. 2d 707 (9th Cir. 1952), and that the United States, like any other private landholder, is entitled to protect its property against such trespassers. *See, Camfield v. United States,* 167 U.S. 518, 524 (1897); *Utah Power and Light Co. v. United Stated,* 243 U.S. 389, 404 (1916).

29. The Gardners have willfully allowed their livestock to graze on the Humboldt National Forest in violation of federal law and regulation which require a written permit from the Forest Service and compliance with the permit's terms and conditions.

30. Such conduct constitutes a trespass — the intentional use of the property of another without authorization. W. Page Keaton et al., *Prosser and Keaton on the Law of Torts* § 13 at 70 (5th ed. 1984); Restatement 2d of Torts, §§ 158-159.

Appendix B

31. A necessity defense requires that four elements be satisfied: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law. *United States v. Schoon,* 955 F.2d 1238, 1239-40 (9th Cir. 1991).

32. The circumstances of the instant case certainly fall outside the realm of a necessity defense. Such a defense is wholly inconsistent with the Gardners' challenge to federal ownership of these lands. In order to raise a necessity defense, the Gardners must assume that the federal government owns the lands and that the Gardners are in fact trespassing. However, the Gardners refuse to acknowledge federal ownership and therefore must forego such a defense.

33. Even assuming that the Gardners were to recognize federal ownership of these federal public lands, the Gardners provide absolutely no evidence to support any of the elements of a necessity defense.

34. None of the Gardners' counsel's conjecture is supported by affidavit or otherwise.

35. In fact, nowhere within Cliff Gardner's lengthy affidavit is there anything that relates to a legally cognizable necessity to trespass upon the Humboldt National Forest.

36. In addition, the Gardners also fail to acknowledge that other legal remedies were available — an administrative appeal process, which they decided not to pursue.

37. Thus, the Gardners have failed to meet their burden of going forward with a necessity defense because "the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." *United States v. Dorrell,* 758 F.2d 427 (9th Cir. 1985).

38. No material issues of fact are in dispute and, after considering the well-established precedent supporting the legal issues presented here, the United States is entitled to summary judgment.

39. Based upon this willful trespass, the United States is entitled to protect its property against this trespass by having a permanent injunction entered, the Gardners' cattle removed, and payment by the Gardners of the unauthorized grazing use fee of $7,030.41 as of September 8, 1995. *See, Light v. United States,* 220 U.S. 523 (1911). *See also, Camfield v. United States,* 167 U.S. 518, 524 (1897); *Utah Power and Light Co. v. United Stated,* 243 U.S. 389, 404 (1916).

IT IS THEREFORE ORDERED that no material issues of fact are in dispute and, after considering the well-established precedent supporting the legal issues presented here, the United States motion for summary judgment (#7) is GRANTED.

IT IS FURTHER ORDERED based upon the Gardners' willful trespass, the United States is entitled to protect its property against this trespass and a permanent injunction is hereby entered.

IT IS FURTHER ORDERED that the Gardners' cattle will be removed within twenty days of the date hereof, and payment by the Gardners of the unauthorized grazing use fee

of $7,030.41 as of September 8, 1995, will be made to the United States within thirty (30) days of the date hereof. The Clerk shall enter judgment accordingly.

DATED: This 2nd day of October, 1995.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA FILED OCTOBER 4, 1995

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CASE NO. CV-N-95-328-DWH

UNITED STATES DISTRICT COURT,

Plaintiff(s),

vs.

CLIFFORD GARDNER, ET AL.,

Defendant(s)

JUDGMENT IN A CIVIL CASE

* * *

x **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that no material issues of fact are in dispute and, after considering the well-established precedent supporting the legal issues presented here, the United States motion for summary judgment (#7) is granted. IT IS FURTHER ORDERED based upon the Gardners' willful trespass, the United States is entitled to protect its property against this trespass and a permanent injunction is hereby

entered. IT IS FURTHER ORDERED that the Gardners' cattle will be removed within twenty days of the date hereof, and payment by the Gardners of the unauthorized grazing use fee of $7,030.41 as of September 8, 1995, will be made to the United States within thirty (30) days of the date hereof.

October 4, 1995

LANCE S. WILSON, Clerk

s/ Connie S. DuBack
By C. DuBack
Deputy Clerk

I[illegible]TION FILED
JUL 14 1997

(2)

No. 96-1896

In The

Supreme Court of the United States

October Term, 1997

CLIFF AND BERTHA GARDNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF DAVID HAIGHT FOR LEAVE TO FILE OUT-OF-TIME BRIEF AMICUS CURIAE IN SUPPORT OF PETITION AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE LATE BRIEF IN AMICUS CURIAE

Amicus Curiae hereby moves for permission to file his brief untimely. His motion for same is based upon the fact that he received no notice of the filing or docketing of the Petition for Writ of Certiorari until shortly before the time for filing the Brief in Amicus Curiae was due and too late for him to prepare same on a timely basis.

The Petition for Writ of Certiorari was apparently filed on May 27, 1997 and docketed on May 29, 1997. Notice thereof is required to be sent to all interested parties. Amicus Curiae did not receive notice of same until several days prior to the date upon which his Brief herein was due. Although Amicus Curiae is entitled, under the Rules, to thirty (30) days from the date of docketing to file his brief he did not receive actual notice of docketing until June 19, 1997, notice having been actually mailed on June 14, 1997, according to the postmark.

It would not be fair to deny Amicus Curiae the right to file his Brief in Amicus Curiae based upon this late notice and Amicus Curiae therefore respectfully requests that this Honorable Court grant leave for him to file his Brief late in light of the late notice he received.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE*

A member of the Lyon County Public Lands Planning Commission, as *Amicus Curiae*, files this brief in support of the position of Cliff Gardner and Bertha Gardner, Defendants-Petitioners in this case.

The Lyon County Public Lands Planning Commission was established by County Ordinance as an advisory Commission to the County Commissioners. Its duty as the Public Lands Planning Commission is to keep abreast of problem public lands issues and activities and report the various problem areas back to the County Commissioners. In addition, the Public Lands Planning Commission is directed by the County Commission to investigate and/or study selected problems related to public lands and report its recommendations to the County Commissioners.

Each member of the Lyon County Public Lands Planning Commission has contact with the people directly connected with public land use, both Federal employees and users, on a continuous basis. Being a member has resulted in a detailed understanding of on-going controversies regarding public lands.

A large problem area connected with public lands is the so called "land exchanges". Information received from a "whistle blower" revealed that there were secret meetings, being conducted almost on a daily basis, in the Nevada state BLM office dealing with a "land exchange". In a subsequent meeting with the then State Director of the BLM he was asked why this exchange was not known by the public. His answer was "It is now.".

The land exchange resulted in the selling of a small amount of BLM land in the Las Vegas area, to be used by a land developer, resulting in a large increase in the tax base of Clark County. The money was then taken and used to purchase a large amount of

* Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of the brief.

land in the Lake Tahoe area. This land had been slated for development as a ski resort and residential area. The end result was a huge loss to the tax base of Washoe and Douglas Counties.

Currently there is a "land exchange" in progress affecting Lyon County, Douglas County, the BLM, the USFS and a developer. The BLM will exchange a large amount of land, located in Lyon County, to be used as an industrial park. This land has a very high dollar value due to its intended use. A smaller amount of land to be received by the BLM and USFS in the "land exchange" could be classified as waste land.

On the surface it would appear that Lyon County was receiving a "windfall" in this "land exchange". However a small portion of this "wasteland", to become USFS land, is on the site of a previously-proposed dam to be constructed on the Walker River. This dam could put the Federal Government in a position to possibly control the water flow on the Walker River. Should this occur, it could have a devastating effect on agriculture in Lyon County. However, even if the dam scenario did not occur, the difference in property dollar value would result in a large loss to the taxpayers. This loss would result due to the large dollar value difference between the two land parcels.

A second problem is the apparent lack of credibility and accountability of Federal employees in their management of existing public lands. On one occasion the Lyon County Public Lands Planning Commission received data from a research corporation showing that grazing allotments for sheep issued from the USFS Bridgeport Ranger District, in the Humboldt-Toiyabe National Forest, were drastically reduced approximately 60% over a given time period. The Commission published these data. The Bridgeport Ranger District disputed the figures and claimed the decrease was only 6%. In a subsequent presentation made by the Bridgeport Ranger District to the Public Lands Planning Commission, it was shown, using their own data, that the decrease was approximately 50%. Later analysis showed the decrease to be closer to 60%.

The apparent lack of knowledge on behalf of the Federal Government relative to the proper management of public lands is obvious. It is time to rule that the position advanced by the Defendants-Petitioners that a State holds title to the unappropriated public lands within its external borders is a valid and proper legal decision.

ARGUMENT

I. THE IRRATIONAL REASONING OF THE APPEALS COURT

The position taken by the lower court cannot stand. To come to the conclusion that the original thirteen States and those States that were formed from the original unappropriated public lands have a sovereign claim to their lands that cannot be claimed by other States, would make those other States unequal.

Indeed, various States were formed from a multitude of different lands. There are three States that were formed from lands taken partially from the original territory and partially from other lands. These States are Minnesota, Mississippi, and Alabama. In the case of Alabama the vast majority of the State was made up from land taken from the original territory and just a small portion from land taken from the Louisiana Purchase. It is significant to note that within that small portion of land from the Louisiana Purchase lies the County and City of Mobile.

The Appeals Court in addressing the case, *Pollards Lessee v. Hagen*, 44 U.S. (3 How.) 212 (1845), takes the position that the Supreme Court decision was based solely on land coming from the States of Virginia and Georgia. And, therefore, Alabama had this sovereign claim to the land. However the land in question in the *Pollards* case was located within the City of Mobile. As previously noted, the land which includes the City of Mobile comes from the Louisiana Purchase not from the original States. This alone would make the lower court reasoning fail.

To go on further, the Supreme Court in the case, *United States of America v. Texas,* 339 U.S. 707 (1949), equates the States of Texas, California, and Louisiana in respect to the Equal Footing Doctrine. One would most certainly have to take the position that Texas had at least the same or even higher sovereign claim to its land as did the original thirteen States. Using this reasoning, the states formed from land that comes from the Louisiana Purchase and the treaty of Guadalupe Hidalgo have the same sovereign claim to their lands as do the original States.

In looking at the State of New Mexico, its lands are made up from the Texas Annexation, the Louisiana Purchase, and the treaty of Guadalupe Hidalgo. Using the rational of the lower court, should those lands in New Mexico that came from the treaty of Guadalupe Hidalgo be treated differently from those lands that came from the Texas Annexation and also differently from those lands that came from the Louisiana Purchase? I think not. Again, the reasoning of the lower court is not acceptable.

Congress recognized the claim to ownership of the unappropriated lands by the various States in 1832. At that time the Public Lands Committee of the United States Senate made a formal report to the Senate and stated:

> Our pledge would not be redeemed by merely dividing the surface into states and giving them names.
>
> The public debt being now paid, the public lands are entirely released from the pledge they were under to that object, and are free to receive a new and liberal destination for the relief of the states in which they lie.
>
> Nearly one hundred million acres now in market are the refuse of sales and

> donations through a long series of years, and are of very little actual value, and only fit to be given to settlers or abandoned to the states in which they lie.
>
> The speedy extinction of the Federal title within their limits is necessary to the independence of the new states, to their equality with the older states, to the development of their resources, to the subjection of their soil, taxation, cultivation and settlement, and to the proper enjoyment of their jurisdiction and sovereignty.
>
> The ramified machinery of the Land Office Department and the ownership of so much soil extends the patronage and authority of the General Government into the heart and corners of the new states and subjects their policy to the danger of a foreign and powerful influence.

To apply the thoughts of Congress stated above, one need only to look at two states, Louisiana and Missouri. Louisiana was admitted into the Union in 1812. Missouri was admitted into the Union in 1821. Both States were formed from land that came from the Louisiana Purchase. Both States were part of the Union before 1832. Therefore Congress must have intended for them to be included in the States that should receive ownership of all its public lands. These were not States that came from the original territory, as required by the lower court. Again, the lower courts reasoning cannot stand.

The appeals court reasoning goes even further in that it takes the position that the Federal Government held complete title to all public lands in Nevada prior to statehood and that Nevada never at any time had the same claim to title as did the original states. Because of this the lower court takes the position that the Federal

Government has complete ownership and legislation over these lands. If that were true there would be no need for Nevada to cede any of these lands to the Federal Government for any reason. Does that mean that Article I, § 8, cl. 17 of the United States Constitution does not apply to the State of Nevada? Once again, I think not.

II. THE FLAWED POSITION OF THE JUSTICE DEPARTMENT

The flawed position taken by the United States Justice Department is the power given to Congress under the Property Clause can be applied to the unappropriated public lands within any State. The Justice Department also takes the flawed position the Supremacy Clause operating in tandem with the Property Clause gives the Federal Government supreme power over these lands.

III. THE SUPREMACY CLAUSE

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution reads in part, "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . .". As such, in order for a Federal law to be supreme over a State law, that Federal law must be within the confines or limits of the United States Constitution. In defining the limits of the Supremacy Clause the Court did so quite eloquently in *Kansas v. Colorado*, 206 U.S. 46 (1906). The Court found in this case that the reclamation of arid lands not the property of the United States, nor situated within the limits of a territory, was not comprehended in the grant to Congress by the United States Constitution under the Property Clause. The Court further found that State laws in respect to the reclamation of arid lands cannot be overridden by Congress. Simply stated, under the Supremacy Clause, if Congressional legislation exceeds the power granted to Congress by the Constitution, that legislation does not override State legislation.

Applying simple logic, if the power granted to Congress under

the Property Clause cannot be applied to the unappropriated public lands within a State, the Supremacy Clause cannot be used to enforce that power.

IV. THE PROPERTY CLAUSE

The Property Clause, Art. IV, § 3, cl. 2 reads as follows: "The Congress shall have Power to dispose of and make all needed Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, *or af any particular state*.". (emphasis added.)

The cornerstone of the legal argument taken by the Justice Department to establish the Federal Government ownership of the unappropriated public lands is *Kleppe v. New Mexico,* 426 U.S. 529 (1976). In their legal position, the Justice Department has misread this ruling. The judgment in the *Kleppe* case was a declaratory judgment and was remanded back to the lower court. Therefore, the judgment in *Kleppe* is the law of the land, it is the opinion of the Court to be applied solely to the issue in the case and directed only at the two litigants. The ruling of the Court did not require the two litigants to do anything. In the *Kleppe* case the issue was stated by the Court as, "At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-Roaming Horses and Burros Act.". The issue in the *Kleppe* case was Congress' power to enact legislation, not the constitutionality of the legislative act itself.

The issue in the *Kleppe* case is not about wild horses and burros, it is not about the Property Clause, and it is not about public lands. The issue in the *Kleppe* case establishes Congress' Constitutional right to enact any legislation, however, once that legislation is enacted, constitutionality can be challenged in court. The Court stated in its opinion in the *Kleppe* case, "In answering this question, we must remain mindful that, while courts must

eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress.".

The Court goes on to say in the *Kleppe* case, "Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.". The reading of this dicta cannot be construed in any way other than the State has jurisdiction over the public lands. But what does the Court say about Congress? The Court says that Congress may enact legislation. Nowhere in the *Kleppe* case does the Court say that the power granted to Congress under the Property Clause can be applied to the public lands in the State of New Mexico. No where in the *Kleppe* case does the Court say that the Federal Government has control over the public lands.

The portion of the Courts opinion in the *Kleppe* case that the Justice Department has misread or misinterpreted reads as follows: "And while the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public lands entrusted to Congress is without limitations.' ". This statement is completely correct. In making the statement the Court cites from *United States v. San Francisco*, 310 U.S. 16 (1940); *Light v. United States*, 220 U.S. 523 (1911) and *United States v. Gratiot*, 14 Pet. 526 (1840).

The *Gratiot* case is the origin of this position and dealt with the State of Illinois. When Illinois was still a part of the original Territory, and before it became a state, the Federal Government issued lead mine leases. When Illinois became a State, Illinois laid claim to all of the land within its external boundaries and also claimed the leases. The Court rejected the second claim on the basis that the lead mine leases were issued while Illinois was still part of a territory and before it became a State. The Court said, "The term 'territory' as here used, is merely descriptive of one kind of property, and is the equivalent to the words 'lands'. And Congress has the same power over it as any other property

belonging to the United States; and this power is vested in Congress without limitations, and has been considered the foundation upon which the territorial governments rest." Clearly the power given to Congress under the Property Clause is applicable to a territory and not to a State.

Restriction of the power of the Property Clause to a territory is defined in *Dred Scott v. Sanford,* 60 U.S. 393 (1856). After the Revolutionary War, the thirteen colonies were in fact thirteen sovereign nations. They won their independence and in addition they won all of the unappropriated territory west of them to the Mississippi River. While the seven western colonies claimed that land, the six eastern colonies took the position that all of the colonies won the land in the course of the Revolutionary War, and that each colony had a claim to it. All the colonies finally agreed they would cede this land to the newly to-be-formed Confederation in order to pay off the debt of the Revolutionary War. They could do this because they were in fact thirteen sovereign nations. However, once this new Confederation was formed, each State lost a small piece of its sovereignty. A legal vehicle was therefore needed to carry out this agreement. That legal vehicle was the Property Clause, put into the Constitution specifically to carry out this agreement. In the *Dred Scott* case, the Court states in part, "It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it has been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire." Quite clearly, the power granted to Congress by the Property Clause is only applicable to a territory and is not applicable to any State. *Dred Scott* goes on further in citing *Harcourt v. Gaillard,* 25 U.S. 523 (1827). After the signing of the Declaration of Independence, Great Britain made a land grant located within what is now Florida. Both South Carolina and Georgia laid claim to this land. The

Federal Government also claimed the land. The Court stated in the *Harcourt* case, "There was no territory within the United States that was claimed in any other right than that of some one of the confederate states; therefore, there could be no acquisition of territory made by the United States distinct from, or independent of some one of the states." Clearly, the Federal Government is restricted in its owning of public lands.

V. THE EQUAL FOOTING DOCTRINE

The *Title* to all unappropriated public lands within each State passed to that State upon its admission to the Union under the Equal Footing Doctrine. This doctrine was upheld in *Pollards Lessee v. Hagen*. In the *Pollards* case the Court states, "And the statute passed by Virginia authorizing her delegates to execute this deed, and which is recited in it, authorized them, in behalf of the state, by a proper deed to convey to the United States, for the benefit of said states, all the right, *Title*, and claim, as well of soil as jurisdiction, . . ." (emphasis added). The Court further states, "when the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, *to the same extent, in all respects*, that was held by the states ceding the territories," (emphasis added).

Again applying simple logic, if the original States passed *Title* to the Federal Government, they had to have held *Title*, you cannot give away something you do not have. Therefore when the new States entered the Union on an equal basis in all the same respects as the original States the new States gained *Title* to all the unappropriated public lands within their external boundaries. The Court further states in *Pollards*, "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed."

In reading directly from the Virginia Act of Cession — 1783,

the Virginia Legislature states, "all right, title, and claim as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country within the limits of the Virginia charter, . . . ; and that the States so formed shall be distinct republican States, and admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States".

It is quite evident that the intent of the Virginia Legislature was to pass on to any and all States formed from the ceded territory *all* rights held by Virginia. This most certainly includes the right to claim *Title* to *all* lands, both wet and dry, that are within the external boundaries of the newly formed states.

The Equal Footing Doctrine was upheld in its entirety in *Coyle v. Smith,* 221 U.S. 559 (1910). The *Coyle* case dealt with the location of the state capital of Oklahoma, and the Court stated, "on her admission, she at once became entitled to and possessed of all rights of dominion and sovereignty which belonged to the original States." This dicta indicates that a State gains *Title* to all of the unappropriated public lands within its external boundaries upon admission into the Union, to the same extent, that the original States held *Title* to the lands within their external boundries.

In a later case, *Utah Division of State Lands v. United States,* 482 U.S. 193 (1987), the Court states, "Because all subsequently admitted States enter the Union on a 'equal footing' with the original thirteen States, they too hold *Title* to the land under navigable waters within their boundaries upon entry into the Union." (emphasis added).

In the *Phillips Petroleum Company and Cinque Bambini Partnership v. Mississippi and Saga Petroleum U.S. Inc.,* 484 U.S. 469 (1988), the Court ruled that all lands under water subject to the ebb and flow of the tide, regardless of whether such waters are navigable, are within the public trust given to the States upon their entry into the Union. The question asked in *Phillips* did not deal

with land beneath navigable waters, but with tidelands. *Phillips* further upheld the Equal Footing Doctrine in that it did not limit title to land under navigable waters and is in complete compliance with *Pollards* and *Coyle*.

However, in the dissenting opinion of that case, it was brought out that 150 years of title chain must be considered. This is most certainly a valid concern. However it is only necessary to follow the multitude of court decisions that have granted the Federal Government the right to reserve lands for many different purposes. That granting of power makes valid any claim to title by an individual obtaining land as a result of the Federal Government reserving that land.

VI. CONGRESS' RIGHT TO TAKE LAND BY CONDEMNATION

Congress has the right to take land by condemnation under the General Welfare Clause. This right was brought forward in *United States v. Gettysburg Electric Railway Company*, 160 U.S. 668 (1895). The *Gettysburg* case dealt with the taking of land, owned by a railroad, in order to preserve the battlefield of Gettysburg for the good of the nation as a whole.

In the *Gettysburg* case the Court states, "It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare." The Court goes on to say, "Such a use seems necessarily, not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country."

This holding was observed in *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977). In that case the Court states, "Similarly, Congress' interest in and expansive authority to act in preservation of monuments and records of historical value to our national heritage are fully established. *United States v. Gettysburg Electric R. Co.,* 160 U.S. 668." The right of Congress to take land by condemnation is further illustrated in *Charles Paul v. United States,* 371 U.S. 245 (1962). In the *Paul* case the Court states, "The power of the Federal Government to acquire land within a State by purchase or by condemnation without the consent of the State is well established. *Kohl v. United States,* 91 U.S. 367, 371, 23 L. Ed. 449, 451. But without the States 'consent' the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being that of an ordinary proprietor." This decision clearly limits the Federal Government in its power to regulate lands that it has taken by condemnation or by reserving them. Those lands are subject to state legislation.

When Congress acted to take the land in the *Gettysburg* case by condemnation, it was in fact a true "taking". The Federal Government had to pay the railroad just compensation for the land it lost.

VII. CONGRESS CAN TAKE LAND BY RESERVING IT

Congress can also acquire land by reserving it. This was shown in the case of *Emil Grisar v. Irwin McDowell,* 73 U.S. 363 (1867). *Grisar* is a San Francisco case and dealt with San Francisco's right to select four square leagues of land of its choice. This right was obtained by San Francisco by Mexican law that was in effect at the time of conquest by the United States. That law allowed any pueblo to select any four square leagues of land of its choice.

The United States however desired a portion of the land selected by San Francisco to be used for a gun emplacement. Therefore that portion of the land to be used was withdrawn from the allowed four square leagues of land and another piece of land substituted.

In justifying its position the Court said, "Until this was done,

the government was not precluded from setting apart and *appropriating* any portions of lands claimed, which might be necessary for public uses." (emphasis added.) The Court further states, "But further than this: from an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses."

There are a large number of cases dealing with the right of the Federal Government to reserve lands; *Samuel G. Wolcott v. The Des Moines Navigation and Railroad Company*, 72 U.S. 681 (1866); *United States v. Midwest Oil Company,* 236 U.S. 459 (1914); *United States of America v. James E. O'Donnell,* 303 U.S. 501 (1937); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1941). These cases deal with a wide variety of land types and land uses. However the conclusion to be drawn from all these cases is that the Federal Government can, and has, in fact reserved large amounts of public lands for the general welfare of the nation as a whole. The Court has consistently upheld the Federal Government's right in the reserving of those lands.

This is also true in the case of *John E. Scott v. Charles P. Lattig,* 227 U.S. 229 (1912). In that case the dispute was over islands in a navigable river. Both the State and the Federal Government claimed ownership of the islands. The Court ruled in favor of the Federal Government. This was of course correct.

Indeed, it can be seen that all lands condemned or reserved by the Federal Government was allegedly done so for the general welfare of the nation as a whole. National Forests were reserved to supply a continuous supply of lumber for the nation. President Clinton in his recent taking of 1.7 million acres of land from the state of Utah, allegedly did so for our children and our grandchildren. The Federal Government can claim ownership of such lands, but when it does so it becomes a taking. That ownership is merely that of an ordinary proprietor.

VIII. THE RESERVING OF LANDS IS A TAKING

Since *Title* and not possession of all unappropriated public lands passed to the States, under the Equal Footing Doctrine, upon their entry into the Union, they have an absolute claim of title to any lands condemned or reserved by the Federal Government. Yet again applying simple logic, since title to all unappropriated public lands passed to the States upon statehood, but the Federal Government has the right to reserve some of those lands for public use, the reserving of those lands becomes a taking.

This reasoning is supported in *Block, Secretary of Agriculture v. North Dakota Board of University and School Lands*, 461 U.S. 273 (1983). In the *Block* case Congress claimed ownership to lands under a then non-navigable river. North Dakota claimed the river was navigable at the time North Dakota entered the Union and therefore title passed to North Dakota under the Equal Footing Doctrine. The Court held that the 12 year statute of limitations of the Quite Title Act was applicable to a State as well as it is to all others. The Court therefore ruled in favor of the United States.

The Court however does state in the opinion of the *Block* case:

> The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution. Such a law would not run afoul of the equal-footing doctrine or the Tenth Amendment, as asserted by North Dakota, but would constitute a taking of the State's property without just compensation, in violation of the Fifth Amendment. Section 2409a(f), however, does not purport to strip any State, or anyone else for that matter, of any property rights. . . . If a claimant has title

> to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under § 2409a(f). A dismissal pursuant to § 2409a(f) does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet suit, in which the matter would finally be put to rest on the merits.

Although the holding in the *Block* case dealt with the applicability of the statute of limitations in the Quite Title Act to a State, the reasoning by the Court relative to "taking" is applicable to any act of Congress. The act of Congress could be the establishing of a National Forest, reserving a wilderness area, or any number of acts dealing with the reserving of lands and could result in a "taking", provided title to those lands passed to the State under the Equal Footing Doctrine. Congress certainly has the power to reserve lands, but when Congress does so, Congress must pay the State just compensation for the taking of those lands.

The Court has not ruled on all types of lands the Federal Government can or cannot reserve. The Court also has not ruled on what amounts of land the Federal Government can or cannot reserve. Until such time as the Court makes these rulings, the questions must remain unanswered.

CONCLUSION

For all of the reasons stated above, Amicus Curiae respectfully requests this Honorable Court to reverse the decision of the appeals court and grant the relief sought by Cliff Gardner and Bertha Gardner.

Respectfully submitted,

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